

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO:

In the matter between:

GROUNDUP NEWS NPC	First Applicant
NATHAN GEFFEN	Second Applicant
RAYMOND JOSEPH	Third Applicant

and

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL	First Respondent
CHAIRPERSON OF THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL	Second Respondent
MR Y MAYET	Third Respondent
THE GAUTENG PROVINCIAL LEGAL PRACTICE COUNCIL	Fourth Respondent
LESLEY NKHUMBULENI RAMULIFHO	Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

NATHAN GEFFEN

affirm that:

- 1 I am the editor of GroundUp, and the second applicant in this matter.
- 2 I am duly authorised to make this affidavit on behalf of GroundUp News NPC, the non-profit company that owns and operates the GroundUp publication.
- 3 The facts stated herein are within my personal knowledge except where the context indicates otherwise, and are, to the best of my belief, true and correct.
- 4 Where I make legal submissions, I do so on the advice of the applicants' legal representatives, which advice I believe to be true and correct.

THE PARTIES

- 5 The first applicant is GroundUp News NPC, the owner and publisher of GroundUp. GroundUp is the name of an online news brand, which publishes news reports and opinions that are in the public interest and focus on social justice stories in vulnerable communities.
- 6 I am the second applicant in this matter. I am employed by the first applicant. I was one of three complainants in a complaint submitted to the first respondent on 4 May 2020, and which the third respondent, acting as an investigating committee of the first respondent, dismissed on 13 October 2020.
- 7 The third applicant is **RAYMOND JOSEPH** ("**Mr Joseph**"). Mr Joseph is a freelance journalist. Mr Joseph was the third complainant in the complaint in issue in these proceedings. Mr Joseph from time to time writes and submits to

me, as well as to other publishers, articles to consider for possible publication. I also, from time to time, commission Mr Joseph to research and write articles on specific subjects for publication in GroundUp.

8 The first respondent is **THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL**, an entity established as a body corporate in terms of section 4 of the Legal Practice Act 28 of 2014 ("**the LPA**"). I refer to the first respondent as "**the LPC**".

8.1 This is an application to review and set aside a decision of an investigating committee established by the LPC, in terms of the LPA. The LPC is accordingly cited as the body ultimately responsible for the impugned decision.

8.2 The LPC's address for service is Thornhill Office Park, building 20, 94 Bekker Road, Vorna Valley, Midrand.

9 The second respondent is the **CHAIRPERSON OF THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL**. The second respondent is cited in her official capacity in terms of Uniform Rule 53(1).

10 The third respondent is **Y MAYET**. Mr Mayet was the investigating committee that took the decision to dismiss the complaint, the impugned decision in this matter. Mr Mayet is accordingly cited in his capacity as the investigating committee, in his official capacity in terms of Uniform Rule 53(1).

- 11 The fourth respondent is the **GAUTENG PROVINCIAL LEGAL PRACTICE COUNCIL** (“**the provincial council**”). The provincial council is cited for any interest it may have in the matter. Its address for services is Procforum Building, 123 Paul Kruger Street, Pretoria.

- 12 The fifth respondent is **LESLEY NKHUMBULENI RAMULIFHO** (“**Mr Ramulifho**”).
 - 12.1 Mr Ramulifho was the respondent in the complaint before the LPC, and is cited in these proceedings for any interest he may have in the matter. No relief is sought against Mr Ramulifho directly, except costs in the event that he opposes this application.

 - 12.2 Mr Ramulifho practises as an attorney at 21A, Garsfontein Office Park, 645 Jacqueline Drive, Garsfontein, Pretoria at Ramulifho Inc Attorneys, registration number 2016/528937/07.

OVERVIEW OF THIS APPLICATION

- 13 This matter concerns alleged misconduct by an attorney, and the LPC’s failure to fulfil its disciplinary functions in respect of that attorney. It arises from a decision taken by the LPC’s investigating committee to dismiss a complaint relating to four instances of dishonesty on the part of an attorney – Mr Ramulifho.

- 14 The acts of dishonesty relate to statements made by Mr Ramulifho under oath in proceedings before the High Court. Mr Ramulifho was the applicant in those proceedings, and Mr Joseph and I were respondents.

- 15 In those proceedings, we believe that Mr Ramulifho –
 - 15.1 referred to documents which were fraudulently fabricated either by him or under his direction (including two supporting affidavits, two proofs of payment and a bank statement); and

 - 15.2 committed perjury, in that he confirmed under oath that the fabricated documents reflected the truth when he would have known that statement to be false.

- 16 If Mr Ramulifho did indeed do these things, he is guilty of serious misconduct. Lying under oath and fabricating documents is conduct evincing grave dishonesty, which severely compromises a person's fitness to practise as an attorney.

- 17 We believed that Mr Ramulifho had committed an egregious and blatant breach of ethics that justified action on the part of the LPC, as the *custos morum* of the legal profession. We, including our attorney, Jacques Floris Louw, submitted a complaint to the LPC, detailing the acts of dishonesty, and attaching documentary evidence of the misconduct of which we alleged Mr Ramulifho to be guilty.

- 18 The LPC is charged with regulating the conduct of legal practitioners in the public interest. It is duty-bound to protect the public against unscrupulous legal practitioners, in whom the public might otherwise unwittingly place their trust. When the LPC performs its disciplinary functions – which begin with investigating a complaint – it does so in fulfilment of its duties to the public.
- 19 In this case, the LPC has failed to fulfil those duties.
- 20 The LPC's investigating committee, though endowed with extensive powers to assist in investigating complaints, conducted no investigation into the complaint whatsoever. Instead, it approached its task as though it were a judge in motion court: finding that the onus was on us, the complainants, to prove that there was a basis on which a disciplinary committee might make a finding of misconduct; applying a strict evidentiary standard to the documents we had submitted; and ultimately concluding that we had not done enough, on the papers, to persuade it that Mr Ramulifho was guilty of misconduct. Instead of making its own inquiries in an attempt to gather the necessary facts, or to test or augment the evidence we had provided, the committee dismissed the evidence provided out of hand, on the basis that it was "*hearsay*" or "*not credible*".
- 21 The committee also took the extraordinary position that certain questions of fact were beyond its remit, and first had to be determined by a different authority before the LPC could consider them.

- 21.1 For instance, the committee said that it could not consider whether Mr Ramulifho had forged the relevant documents, because this was for a question of fact for some “*other authority*” to determine.
- 21.2 On the committee’s reasoning, before a complaint is made to the LPC, the complainant must first approach a High Court to obtain a determination on the facts – because evidence that has already passed “*judicial scrutiny*” is the only evidence the LPC will accept as evidence of misconduct.
- 21.3 This is frankly an astonishing position for the LPC – the statutory body tasked with regulating the conduct of legal practitioners in the public interest – to take. The import of the LPC’s approach is that disciplinary proceedings before the LPC would always have to be preceded by a court hearing to determine the facts. That would render the disciplinary role of the LPC, and its investigative powers, nugatory.
- 22 The investigating committee decided that misconduct proceedings were not warranted. It dismissed the complaint out of hand, with the result that Mr Ramulifho did not have to face a disciplinary hearing. Mr Ramulifho, to the best of my knowledge, continues to practise as an attorney, and the public continues to place its trust in him.
- 23 This is an application to review and set aside the investigating committee’s decision to dismiss the complaint. I submit that the decision is unlawful, for at least the following reasons:

- 23.1 Before an LPC investigating committee may dismiss a complaint, it is required, in terms of section 37(3) of the LPA, to conduct an investigation. The committee failed to do so. It regarded its role as that of a passive adjudicator of claims made on paper, rather than a proactive investigator. What the committee did in this case cannot properly be described as an “*investigation*” at all.
- 23.2 Section 37(3) provides that an investigating committee may only dismiss a complaint if it is satisfied that the conduct in question does not necessarily warrant misconduct proceedings. For its decision to be lawful, the committee must have a reasonable basis for being so satisfied. In this case, the committee did not have reasonable grounds to sustain its opinion that misconduct proceedings were not warranted. It had before it evidence of misconduct, and had various avenues of investigation open to it. It elected to dismiss that evidence out of hand, without any further investigation. It cannot, in the circumstances, have had reasonable grounds to pronounce itself satisfied that misconduct proceedings were not warranted.
- 23.3 As the committee did not investigate the complaint properly (or indeed at all), it followed an irrational procedure. It is not possible for the committee to have arrived at a rational decision to dismiss the complaint without it having investigated the complaint and conducted a proper assessment of the relevant evidence relating to the complaint.

- 23.4 The committee's conclusions are also substantively irrational and unreasonable. In particular, its conclusions that Mr Ramulifho is not guilty of misconduct; that Mr Ramulifho has given a reasonable explanation for his conduct; and that there is no reasonable prospect of success in preferring a charge of misconduct against Mr Ramulifho, have no basis in the information before the committee, or its own reasons.
- 23.5 The committee's decision to dismiss the complaint was based on a fundamental misunderstanding of its powers and obligations. Its decision was based on material errors of law.
- 23.6 The committee's erroneous approach to the investigation and the evidence also meant that it failed to take relevant considerations into account – such as whether there was *prima facie* evidence that the proofs of payment, the FNB statement or the Naude affidavit had been forged; or whether Mr Ramulifho's reply to the complaint was adequate to rebut the veracity of the allegations against him.
- 24 The decision is accordingly reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), or the principle of legality.
- 25 In what follows in this affidavit, I deal with the following issues in turn:
- 25.1 The legal framework.
- 25.2 The relevant factual background.

25.3 The grounds on which the applicants say that the committee's decision ought to be reviewed and set aside. These are as follows:

25.3.1 The committee failed to comply with section 37(3) of the LPA.

25.3.2 The process followed was irrational.

25.3.3 The decision is substantively irrational and unreasonable.

25.3.4 The decision is based on material error of law.

25.3.5 The committee failed to consider relevant factors.

25.4 A just and equitable remedy.

THE LEGAL FRAMEWORK

26 The attorney's profession is an honourable one. It demands complete honesty, reliability and integrity from its members. By being placed on the roll of attorneys, a person is held out to the public as being worthy of their trust. The public expect, and are entitled to expect, complete honesty from attorneys.

27 Given the unique position that attorneys occupy, the profession has strict ethical rules. These rules aim to prevent malfeasance, and to protect the public.

28 The task of enforcing these rules, in the public interest, falls to the LPC. The LPC is the *custos morum* – the “guardian of morals” of the legal profession. Where

the Law Societies used to fulfil this role in respect of attorneys, and the various Societies in respect of advocates, the LPC is, following the coming into force of the LPA, the single entity tasked with regulating the affairs of all legal practitioners, be they attorneys or advocates.

29 One of the key functions of the LPC is to protect the public against unethical and unprofessional conduct by attorneys. It has a duty to discipline legal practitioners, in the public interest.

30 These duties arise from the LPA, read with the LPC's Rules, 2018 ("**the Rules**").

31 The Preamble to the LPA provides that the LPA aims, amongst other things, to -

31.1 *"provide for the establishment, powers and functions of a single South African Legal Practice Council and Provincial Councils in order to regulate the affairs of legal practitioners and to set norms and standards"* (emphasis added) and

31.2 *"to regulate the professional conduct of legal practitioners so as to ensure accountable conduct".*

32 The purposes of the LPA are set out in section 3. They include –

32.1 to create a single unified statutory body to regulate the affairs of all legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession (section 3(c));

- 32.2 to protect and promote the public interest (section 3(d)); and
 - 32.3 to provide a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners (section 3(f)).
- 33 Section 4 of the LPA establishes the LPC. Its objects, set out in section 5 of the LPA, include the following:
- 33.1 to promote and protect the public interest (section 5(c));
 - 33.2 to regulate all legal practitioners (section 5(d));
 - 33.3 to enhance and maintain the integrity and status of the legal profession (section 5(f));
 - 33.4 to uphold and advance the rule of law, the administration of justice, and the Constitution (section 5(k)); and
 - 33.5 to give effect to the provisions of the LPA in order to achieve the purpose of the LPA, as set out in section 3 (section 5(l)).
- 34 The purposes of the LPA and objectives of the LPC are relevant context in which the LPC's disciplinary powers must be viewed.
- 35 Chapter 4 of the LPA sets out the LPC's duties in relation to disciplinary action against legal practitioners (which include attorneys and advocates).

36 The LPA provides for a three-tiered approach to disciplinary decision-making. The matter is first considered by an investigating committee. If the investigating committee so determines, the matter then proceeds to a hearing before a disciplinary committee. The final stage is an appeal before an appeal tribunal. I explain each step in the process below.

37 The first stage is an investigation performed by the investigating committee.

37.1 In terms of section 37(1) of the LPA, the LPC must, when necessary, establish investigating committees to conduct investigations of all complaints of misconduct against legal practitioners.

37.2 The investigating committee consists of a person or persons appointed by the LPC. According to rule 38.4, an investigating committee shall consist of one or more legal practitioners, of whom at least one shall be an attorney where the respondent is an attorney (and one shall be an advocate, where the respondent is an advocate).

37.3 The investigating committee must then investigate the complaint.

37.4 The LPC confers significant powers on the investigating committee to aid its investigation. For instance, in terms of section 37(2)(a), an investigating committee may, for the purposes of conducting an investigation –

“direct any legal practitioner or an employee of that legal practitioner to produce for inspection any book, document or article which is in the possession, custody or under the control of that legal practitioner or

employee which relates to the complaint in question: Provided that the investigating committee may make copies of such book, document or article and remove the copies from the premises of that legal practitioner.”

37.5 The documents the investigating committee may request include, in terms of rule 40.2.4, files, statements, correspondence, accounting records or other documents which are in the possession of or under the control of the respondent or the employee and which relate to the subject matter of the complaint.

37.6 The relevant legal practitioner or employee may not refuse to produce the requested book, document or article, even if he or she is of the opinion that it contains confidential information belonging to or concerning his or her client (section 37(2)(b) and rule 40.2.5).

37.7 The investigating committee may inspect and retain any information obtained pursuant to this request process, and make copies of and take extracts from such information (section 37(2)(a) and rule 40.2.6).

37.8 Rule 40.2 further clarifies the extent of the investigating committee's powers for the purposes of carrying out its investigative responsibilities. For instance:

37.8.1 The investigating committee may *“take any steps which are not prohibited by law to gather information with regard to the complaint or allegation”* (rule 40.2.1).

37.8.2 The investigating committee may request a complainant to provide further particulars on any aspect of the complaint (rule 40.2.2).

37.8.3 The investigating committee may request the respondent to appear before it, in order to assist the committee in formulating its recommendations to the LPC (rule 40.2.3). The respondent may be represented at this appearance, and any statement the respondent makes to the investigating committee may be used in evidence.

37.9 After it has concluded its investigation, the investigating committee either refers the matter to LPC for adjudication by a disciplinary committee, or dismisses the complaint. The requirements in terms of which the investigation committee must make this decision are set out in section 37(3). It provides:

“(3) An investigating committee must, after investigating a complaint, if it is satisfied that –

(a) the legal practitioner, or the candidate legal practitioner concerned may, on the basis of available prima facie evidence, be guilty of misconduct that, in terms of the code of conduct, warrants misconduct proceedings, refer the matter to the Council for adjudication by a disciplinary committee; or

(b) the complaint should be dismissed on the grounds that the conduct in question does not necessarily warrant misconduct proceedings, as set out in the code of conduct, it must dismiss the complaint, inform the Council, the complainant and the legal practitioner, candidate legal practitioner or juristic entity of its finding and the reasons for it, whereafter the complainant may appeal in terms of section 41, if the complainant is aggrieved by-

- (i) *the manner in which the investigating committee conducted its investigation; or*
- (ii) *the outcome of the investigating committee.”*

38 If the investigating committee is, after investigating a complaint, satisfied that the legal practitioner concerned may, on the basis of available *prima facie* evidence, be guilty of misconduct that, in terms of the code of conduct, warrants misconduct proceedings, it must refer the matter to the LPC for adjudication by a disciplinary committee.

39 The matter then proceeds to the second stage: a disciplinary hearing.

39.1 In a disciplinary hearing, a disciplinary committee, consisting of at least three persons, adjudicates the complaint against the legal practitioner, and, if it makes a finding of misconduct, may impose a range of sanctions.

39.2 Section 39 governs the process at disciplinary hearings before a disciplinary committee, and section 40 addresses the process after the disciplinary hearing and the possible sanctions that may be imposed.

39.3 If the disciplinary committee makes a finding of misconduct, the legal practitioner may then appeal against that finding, or against the sanction imposed, or both, to an appeal tribunal established in terms of section 41(2) of the LPA. That is the third stage of the process.

40 If, however, the investigating committee decides to dismiss the complaint, no disciplinary hearing is held at all.

40.1 The complainant's recourse, in that situation, is to appeal to an appeal tribunal. Section 41(1)(b) of the LPA provides:

- “(b) A complainant who is aggrieved by-*
- (i) the manner in which an investigating committee conducted its investigation or the outcome of the investigating committee as referred to in section 37(3)(b); or*
 - (ii) the outcome of a disciplinary hearing referred to in section 40, may, as determined in the rules and within 30 days of being informed of the decision by the investigating committee or the disciplinary committee, as the case may be, lodge an appeal with an appeal tribunal established in terms of subsection (2) against any conduct or finding of the investigating committee or disciplinary committee, as the case may be.”*

40.2 This appeal right is also provided for in section 37(3)(b), as well as rule 44.2.

41 The investigating committee may only dismiss a complaint if the prerequisites in section 37(3) are met. These are as follows:

41.1 The investigating committee can only make its determination “*after investigating a complaint*”.

41.2 The investigating committee must not be satisfied that legal practitioner may, on the basis of available *prima facie* evidence, be guilty of misconduct that warrants misconduct proceedings. (If the committee is so satisfied, it is required to refer the matter to the LPC for adjudication by a disciplinary committee.)

41.3 The investigating committee must be “*satisfied*” that the complaint “*should be dismissed on the grounds that the conduct in question does not necessarily warrant misconduct proceedings, as set out in the code of conduct.*”

41.4 Rule 40.5.2 sets out some illustrative examples of grounds on which the investigating committee might determine that the conduct does not warrant misconduct proceedings. It provides:

“Without limiting the discretion of the investigating committee, the following may be grounds for determining that the conduct in question does not warrant misconduct proceedings-

40.5.2.1 that the respondent is not guilty of misconduct; or

40.5.2.2 that the respondent has given a reasonable explanation for his or her conduct; or

40.5.2.3 that the conduct of which the respondent may be guilty is of an inconsequential nature; or

40.5.2.4 that there is no reasonable prospect of success in preferring a charge of misconduct against the respondent;

40.5.2.5 that the complaint is vexatious or that in all the circumstances it is not appropriate to charge the respondent with misconduct.”

42 The circumstances in which the investigating committee may dismiss a complaint are limited, with good reason. The dismissal of a complaint at this early stage means that no disciplinary hearing ensues. The complaint does not go any further, and the practitioner in question continues to go about his or her business without further investigation from the profession’s oversight body. If the investigating committee is wrong, and the practitioner is guilty of misconduct, its decision effectively permits a practitioner to engage with the public again who ought not to be permitted to do so. The investigating committee’s decision, in

those circumstances, fails to protect the public from unscrupulous practitioners. It is therefore of the utmost importance that the investigating committee apply its mind properly to its decision, before deciding to dismiss a complaint.

43 It bears emphasis that the investigating committee's decision must be preceded by a proper investigation. When the LPC conducts investigations, it does so in fulfilment of its statutory duty to protect and promote the public interest. It follows that, where a complaint is made about a legal practitioner, the LPC is obliged to undertake a proper investigation, to ensure that, where a legal practitioner has a case to answer, the proper disciplinary process is followed. Where a complaint is dismissed without a proper investigation, following only a cursory inquiry into the matter, that purpose is undermined. As I explain in more detail later in this affidavit, that is precisely what happened in this case.

THE FACTS

The complaint to the LPC

44 On 4 May 2020, Mr Joseph, Mr Louw and I made a complaint to the LPC against Mr Ramulifho ("**the complaint**"), relating to four instances of dishonesty on the part of Mr Ramulifho.

45 The acts of dishonesty relate to statements made by Mr Ramulifho under oath in proceedings before courts, including the falsification of documents presented to court as evidence. In all four cases Mr Ramulifho did not make the statements in

his capacity as an attorney on behalf of a client, but in his capacity as a litigant. Nevertheless, he is a practising attorney, and is an officer of the court.

46 Mr Louw made the complaint on his own behalf, as an officer of the court and a member of the LPC, as well as the representative of me and Mr Joseph. Mr Joseph and I were co-complainants. Mr Louw is not a party to this application, but we have instructed him acts as the applicants' attorney of record. Confirmatory affidavits for Mr Louw and Mr Joseph will be filed together with this affidavit, to confirm its content insofar as it relates to them.

47 Mr Louw made the complaint by way of affidavit, and attached various relevant documents. A copy of the complaint, with its annexures, as submitted to the LPC, is attached as **annexure NG1**. Where I refer below to documents that were attached to the complaint, I use the original annexure number, and do not re-attach them to this affidavit.

48 The complaint against Mr Ramulifho arises from his conduct in the matter filed under case number 23291/19 in the High Court of South Africa, Gauteng Division, Pretoria ("**the Interdict Application**"). It relates to what Mr Joseph and I believe to be –

48.1 fraudulent documents created by Mr Ramulifho in the Interdict Application; and

48.2 perjury committed by Mr Ramulifho in the Interdict Application.

49 It is necessary to provide a brief background to the Interdict Application.

49.1 Since February 2018, Mr Joseph wrote a range of articles highlighting improper conduct in management of money by the National Lotteries Commission, an organ of state established in terms of the National Lotteries Act.

49.2 Commencing October 2018, Mr Joseph and Anton van Zyl, the editor of the Limpopo Mirror and an online publication named Zoutnet, researched information about Lottery Grants received by Denzhe Primary Care NPO ("**Denzhe**") from the National Lotteries Commission, which led to a series of articles being written about Denzhe.

49.3 The first of these articles were published in GroundUp on 22 November 2018. By the time the interdict application was launched, two further articles were published on Denzhe, as well as other Lottery Grants received by organisations under the fifth respondent's control.

49.4 Amongst the conduct highlighted in those articles was the following:

49.4.1 The allegation that Denzhe was hijacked from its former members by, amongst others, Mr Ramulifho.

49.4.2 The fact that Denzhe paid two amounts of R264,240.34 and R271,000.00 in respect of Ramulifho's personal business, two Ocean Basket franchises, in 2016.

- 49.5 I do not attach all of the articles written about Denzhe or the fifth respondent, though they can be made available if required. For illustrative purposes, I attach the three articles that preceded the Interdict Application as **annexure NG2**.
- 49.6 Mr Ramulifho took exception to these articles. On 9 April 2019, he, together with his firm (Ramulifho Inc Attorneys) launched the Interdict Application. They asked the Court *inter alia* urgently to order GroundUp to remove all articles from its websites that make any reference to Mr Ramulifho. They also asked the court to order GroundUp to publish a retraction, and not to publish any further articles about him, pending further litigation.
- 49.7 Mr Joseph was cited as the first respondent in the Interdict Application; GroundUp was cited as the second respondent; and I was cited as the third respondent.
- 49.8 The Interdict Application came before the Pretoria High Court on 16/17 April 2019. It was struck from the roll with costs for lack of urgency. The Interdict Application was not dismissed, and it remains incumbent on any of the parties to set the matter down for final adjudication. Due to the Interdict Application being set down on less than one week's notice, the respondents in their answering affidavit reserved the right to file supplementary affidavits.

50 Mr Joseph has since written further articles on this issue, which were published by GroundUp. To date GroundUp has published 34 articles, which made various statements regarding Mr Ramulifho's conduct, including the following:

50.1 The articles stated that Mr Ramulifho seemingly paid R5 million from the Denzhe funds to Etienne Naude Attorneys as part payment of the R11 million purchase price for a house in the Mooikloof Equestrian Estate.

50.2 The articles questioned Mr Ramulifho's claim that the amounts paid to Ocean Basket were loans, and his claim that he repaid the monies.

51 I do not attach all of the further articles here, though they can be made available if required. For illustrative purposes, I attach two of the articles as **annexure NG3**.

52 The complaint did not address Mr Ramulifho's conduct in relation to Denzhe – the alleged hijacking of Denzhe; the payments from Denzhe funds to Mr Ramulifho's Ocean Basket franchises; or the payments from Denzhe funds to Etienne Naude attorneys. The underlying crimes that may have been committed relating to Denzhe are matters for the prosecuting authorities to investigate. The complaint also did not address suspected unlawful conduct in other non-profit organisations, which received over R60 million in lotto money, and which also involved Mr Ramulifho.

53 Instead, the complaint focussed on Mr Ramulifho's conduct in relation to the Interdict Application: statements he made under oath in those proceedings which

we believe to be false (constituting perjury), and documents he attached to his affidavits in those proceedings, which we believe to have been falsified. These are complaints of serious misconduct against a legal practitioner, over which the LPC has disciplinary jurisdiction.

54 The complaint was, in summary, that in court papers and under oath, Mr Ramulifho –

54.1 referred to documents which were fraudulently fabricated either by him or under his direction (including two supporting affidavits, two proofs of payment and a bank statement); and

54.2 confirmed under oath that the fabricated documents reflected the truth when he would have known the falsity of the statement.

55 The complaint had four main aspects. I address each below. Additional details appear from the complaint itself, which is to be read together with this affidavit.

First complaint: the Tshikalange affidavit

56 In the Interdict Application, one of the statements to which Mr Ramulifho took exception was a statement that Mr Ramulifho had hijacked Denzhe. This statement appeared in an article Mr Joseph wrote, which was published on 22 November 2018.

57 In his founding affidavit in the Interdict Application, Mr Ramulifho attempted to refute this statement. To do so, he attached, as Annexure G, a letter that he says

(at paragraphs 6.1-6.3 of his founding affidavit) he instructed his attorney to write to Mr Joseph, together with the annexures to that letter. He goes on to refer to that letter as providing the “*actual facts*” (paragraph 6.5). A copy of the relevant portions of Mr Ramulifho’s founding affidavit was attached to the complaint as JFL 1.

58 One of the annexures to the letter, which was attached as part of Annexure G to the founding affidavit, is an affidavit purportedly signed by Ms Tshikalange. A copy of the Tshikalange Affidavit was attached to the complaint as JFL 2.

58.1 On the face of the Tshikalange Affidavit, it appears that Ms Tshikalange makes various statements that directly contradict an earlier statement that she made to the South African Police Services (“**the SAPS Statement**”). A copy of the SAPS Statement was attached to the complaint as JFL3.

58.2 In the SAPS statement, Ms Tshikalange states, under oath, that she is the owner of Denzhe Primary Care. She says that she has been defrauded:

“Someone took my NPO documents and change the banking details at FNB. It happened that [I] am funded by National Lotteries the amount R15 000 000. It has been deposited in two amounts R7 500 000 x 2 and now the amount left in the bank is R3304546. I didn’t give permission to anyone. My FNB account no: 62573137489 for Denzhe.”

58.3 But in the Tshikalange Affidavit, it appears that Ms Tshikalange contradicts this previous statement under oath. For instance, the affidavit

states that a “*loan amount*” was paid to Mr Ramulifho, which was authorised by the board, and duly refunded within 10 days.

59 Mr Ramulifho again referred to the Tshikalange Affidavit in his replying affidavit, stating on oath that there was “*nothing untoward about the loans*” and referring the court, as evidence of this claim, to specific portions of the Tshikalange Affidavit. The relevant page of the replying affidavit was attached to the complaint as JFL5.

60 On an inspection of the Tshikalange Affidavit, we found the signature of Ms Tshikalange suspect, for two reasons:

60.1 First, the signatures on the Tshikalange Affidavit and the SAPS statement are, on their face, significantly different.

60.2 Second, the content of the Tshikalange Affidavit and the Tshikalange Statement are irreconcilable.

61 In addition, Mr Joseph informs me that Ms Tshikalange has, in an interview, denied that she signed the Tshikalange Affidavit. A transcript of a WhatsApp conversation between Mr Joseph and Ms Tshikalange on 8 October 2019 was attached to the complaint as JFL4. It appears from that transcript that –

61.1 Ms Tshikalange denies having signed the affidavit; and

61.2 Ms Tshikalange maintains that Mr Ramulifho hijacked her NPO.

62 On 16 and 18 March 2020 Mr Louw contacted Ms Tshikalange's attorney, Moleko Ratau, of Johannesburg. He told Mr Louw that his client is not the person who deposed to an affidavit in support of Mr Ramulifho in December 2018. However, numerous subsequent attempts to obtain further confirmation from Mr Ratau remained unanswered.

63 In the circumstances, I formed the view, supported by Mr Louw and Mr Joseph, that:

63.1 The Tshikalange Affidavit was not signed by Ms Tshikalange and is a forgery.

63.2 The statements made by Mr Ramulifho under oath in his founding affidavit and his replying affidavit, under oath relating to Annexure G (of which the Tshikalange Affidavit formed part), are false. Though Mr Ramulifho said, on oath, that Annexure G set out the "*actual facts*", it did not. These statements were made by Mr Ramulifho knowing that they were false.

64 This is the first aspect of the complaint we made to the LPC.

Second complaint: the proof of payment

65 The second complaint relates to documents Mr Ramulifho attached to his affidavits, styled "*proofs of payment*".

66 Mr Ramulifho's version in both the founding affidavit and his replying affidavit was that he borrowed the amounts of R264,240.34 and R271,000.00 from Denzhe and then repaid it within a week.

66.1 In his founding affidavit, Mr Ramulifho attached, again as part of Annexure G, documents purporting to be proof of repayment of the Ocean Basket loan amounts to Denzhe. The averments he made on oath in relation to Annexure G (as providing the "actual facts") appear from JFL1 to the complaint.

66.2 The two alleged proofs of payment were attached to the complaint as JFL 6 and JFL 7.

67 On 29 November 2019, I made a supplementary affidavit in the Interdict Application in which I drew the court's attention to the following:

67.1 The Denzhe FNB bank statements for the period October to November 2016 had reliably been leaked to Mr Joseph and to me. The Denzhe bank statement shows that the account number ends in ...48493.

67.2 One of the alleged repayments was made on 7 November 2016 of an amount of R264 240.34. This amount does not reflect in the Denzhe bank statement of the same period.

67.3 Both alleged proofs of payment reflect the last six digits of the FNB account to which the alleged repayments were made as ... 695264.

- 67.4 To the best of my knowledge, there is no account (with FNB or otherwise) of Denzhe Primary Care NPO ending in the number ... 695264.
- 67.5 There is, however, a different banking number that entails a number that ends on ...695264: The profile number - not the bank account number - of Denzhe's Nedbank account that was opened on 8 December 2016.
- 67.6 I brought the court's attention to a letter which was sent to Denzhe Primary Care NPO on 8 December 2016. The letter shows that Nedbank Limited opened an account for Denzhe Primary Care NPO on that date, with account number 1140184083, that is, the Nedbank Account. The letter further shows that Nedbank accorded to the account number 1140184083 a profile number, which is 3076695264. Quite remarkably, the last six digits of the Denzhe Primary Care NPO Nedbank profile number is ... 695264, the number that appears on the proof of payment.
- 68 I submitted that the most reasonable inference was that the proofs of payment have been manipulated to fraudulently show a bank payment. A copy of my supplementary affidavit (without its annexures) was attached to the complaint as JFL8. The annexures can be made available to the court if required.
- 69 Mr Joseph Mr Louw and I formed the view that the overwhelming probabilities were that the two proofs of payment are falsified and accordingly –
- 69.1 that Mr Ramulifho committed an act of perjury by referring to them in the founding affidavit and replying affidavit; and

69.2 that Mr Ramulifho possibly committed the fraud, but probably associated himself with the fraud after the fraud was committed and thereby participated therein.

70 This is the second aspect of the complaint we made to the LPC.

Third complaint: the FNB bank statement

71 On 5 March 2020 Mr Ramulifho deposed to an affidavit replying to my supplementary affidavit ("**the second replying affidavit**"). A copy of the affidavit (without the annexures) was attached to the complaint as JFL 9.

72 In paragraphs 17.4 to 22 of the second replying affidavit, Mr Ramulifho responded to the allegations I made concerning the so called "*proofs of payment*". Mr Ramulifho said, on oath, that the repayments that were reflected in the proofs of payment were in fact made to a FNB Money Market account ending in the number... 695264.

73 Mr Ramulifho attached to his affidavit a copy of what purports to be a bank statement relating to that Money Market account. The statement was attached to the second replying affidavit as annexure LR 3 (and forms part of JFL9 in the complaint before the LPC).

74 Annexure LR3 is a patent fraud. I will illustrate this in several ways:

74.1 The statement period reflected on the first page of LR 3 is for the period "*31 October 2016 to 30 November 2016*". However, the statement date

is 31 October 2016. The statement date or statement period or both must have been falsified.

74.2 The summary of transaction on the first page of LR 3 reflects an opening balance of R150,000.00, credits of R535,000.34 and a debit of R 14.10 which should leave a balance of R684 986.24. However, the amounts are added to a closing balance of R685,240.34. Bank automated statements do not make such calculation errors. Some or all of the entries in the summary on page one of LR 3 have accordingly been fraudulently altered to fit the narrative of the second replying affidavit .

74.3 At the bottom of page one of LR 3 appears the inscription: CSFZFNO: 62781923737. FNB has similar inscriptions on all electronically delivered statements issued by FNB. It reflects the account number of the account in respect of which the statement is issued. I know that the account number 62781923737 belongs to an account used by Dinosys NPC, registration number 2015/12967/08, a non-profit company, which was a shelf company until January 2018, when Mr Ramulifho took it over, and from which Mr Ramulifho resigned as a director on 20 September 2018. To the best of my knowledge, it is under his control, and at least two of his staff members (Liesl Joy Moses and Tsietsi Joseph Tshabalala) are directors.

74.4 On page 2 of LR 3 two entries are reflected. The one entry is dated 25 October 2016. However, the statement period only commences on 31

October 2016 (according to page one of LR 3). Both entries are likely to be fraudulently inserted on page 2.

- 74.5 According to the proofs of payment in respect of the repayments referred to under the second complaint above, the repayments were made on 7 November 2016 and 7 December 2016. The dates of the credits do not accord with the proofs of payments.
- 74.6 The VAT Rate at the bottom of the second page of LR 3 is indicated as 15%. However, the VAT rate as at October and November 2016 was 14%. It is therefore clear that the person who falsified LR 3 used a 2018 or later bank statement. The VAT rate changed to 15% on 1 April 2018.
- 74.7 On the second page of LR 3 the following words appear: "*On 23 November 2016, the Prime lending Rate changed to 10.25%.*" It is a fact that the prime lending rate increase with effect from 23 November 2018 was announced by the governor of the Reserve Bank on 22 November 2018. There was no interest rate increase on 23 November 2016.
- 74.8 This document is not in the format of an FNB Money Market Account, which is a simpler document showing only the transactions for the relevant period, but it matches the format of an FNB Current Account statement.
- 75 The only conclusion that is logically possible in the light of the discrepancies highlighted above is that Mr Ramulifho, or someone under his direction, used the

FNB current account statement issued to Dinosys NPC (with number 62781923737) sometime after November 2018 and inserted false 2016 dates, a false account number, a false account holder and fictitious amounts, with a view to presenting the document to court as evidence in support of other fraudulent documents and numerous perjurious statements made by Mr Ramulifho. Any of the seven discrepancies highlighted above is independently fatal to authenticity.

76 I submit that the overwhelming probabilities are that LR3 is a fraudulent document and accordingly –

76.1 that Mr Ramulifho committed an act of perjury by referring thereto in the second replying affidavit, in all likelihood in an attempt to conceal another act of dishonesty and perjury; and

76.2 that Mr Ramulifho either committed the fraud, or he associated himself with the fraud after the fraud was committed and thereby participated.

77 This is the third aspect of the complaint we made to the LPC.

Fourth complaint: the Naude Affidavit

78 In his second replying affidavit, Mr Ramulifho referred to and attached an affidavit that purports to be an affidavit of senior Pretoria Attorney and Conveyancer, Etienne Naude. The Naude Affidavit was attached to the second replying affidavit (and the complaint) as LR2.

79 LR2 was filed in support of Mr Ramulifho's statements in paragraphs 17.2 and 33.2.1 of the second replying affidavit (JFL9), which, in turn, were made in response to the portion of the supplementary affidavit under the heading - Property purchase Plot 448 The Farm Rietfontein 375 (JFL8). Mr Ramulifho claimed, at paragraphs 17.2 and 33.2.1 of the second replying affidavit, that Mr Naude confirms the facts that he attests to in these paragraphs.

80 Mr Louw formed the view, and informed me of his view, that the Naude Affidavit had been forged, for the following reasons:

80.1 Mr Louw inspected LR2 and found that the signature of Naude on LR 2 is significantly different to his normal signature as it appears on transfer documents signed by him. We attached a copy of two pages with Naude's actual signature to the complaint as JFL 10.

80.2 Mr Louw also found that the pages on LR2 that are initialled, purport to be initialled with in print capital letters merely as "EN". Mr Louw informed me he knew of no attorney who would initial that way, nor did Mr Naude do so on the transfer documents. Further, the initials are also remarkably similar in form to the print initials TT of Ms Tshikalange on the Tshikalange affidavit.

80.3 On Friday 13 March 2020, Mr Louw called Mr Naude and asked whether he indeed signed LR2. Mr Naude had no knowledge of the matter and asked to look at the document. He called Mr Louw on Monday 16 March 2020 to confirm that the signature on the affidavit was not his and that he

did not depose to the affidavit. He further confirmed that the facts claimed by Mr Ramulifho about the payment in the second replying affidavit, insofar as they relate to him, were not true. His sole involvement with Mr Ramulifho was to act as transferring attorney on behalf of a certain Dr Nel in a property transaction in 2016.

80.4 Following the discussion with Mr Naude, on Tuesday 17 March 2020, Mr Louw called Werner Pretorius, the commissioner of oaths for the Naude Affidavit. Mr Louw also sent a copy of LR 2 to him. Mr Pretorius confirmed that Mr Naude never appeared before him on 5 March 2020, or otherwise in relation to the Interdict Application. He said he would have recalled it if Mr Naude had appeared before him as a deponent. He said he had a vague memory of acting as commissioner of oaths for Mr Ramulifho on 5 March 2020 and mentioned that he often commissions affidavits for Mr Ramulifho. Mr Pretorius understandably had no independent recollection of the Naude Affidavit, but he speculated that he must have assumed at the time that Mr Ramulifho was the deponent for whom he was acting as commissioner.

81 Therefore, we formed the view that the facts alleged by Mr Ramulifho in paragraphs 17.2 and 33.2.1 of the second replying affidavit were wilfully fabricated and perjurious. We also formed the view that LR2 is a fraud and produced solely with the view to support perjurious claims, to mislead the court and, in all likelihood, an attempt to conceal another crime involving dishonesty.

82 This is the fourth aspect of the complaint we made to the LPC.

The “investigation” and decision

83 The complaint made clear that we, as complainants, regard Mr Ramulifho’s conduct, as set out in the complaint, as as a serious breach of ethics involving criminal conduct committed by an officer of the court, in court documents. We asked the LPC to investigate the matter and to take the necessary steps against him.

84 The next we heard from the LPC was a letter dated 18 June 2020, attaching Mr Ramulifho’s reply to the complaint. I attach a copy of the letter, together with Mr Ramulifho’s reply, as **annexure NG4**.

85 The complaint was extensive, running to 16 pages of affidavit and just short of 100 pages of annexures.

86 By contrast, Mr Ramulifho’s reply to the complaint ran to a mere 2 pages, in which he made no attempt to address the substance or veracity of the complaint. His response, in summary, was as follows:

86.1 Though the complaint is made in the name of three complainants, confirmatory affidavits had not been filed for me or Mr Joseph (para 1).

86.2 The matter is currently already pending before two fora, being the High Court and the SAPS. The LPC would make a third (paras 4 and 5).

- 86.3 No confirmatory affidavits had been filed for Mr Joseph, Ms Tshikalange or her attorney (paras 6 and 7).
- 86.4 Regarding the WhatsApp transcript, neither author had confirmed its content, and Mr Ramulifho's attorneys have sent a letter of demand to Ms Tshikalange regarding the allegations she made in that conversation (paras 8-10).
- 87 That is the sum total of Mr Ramulifho's response to a detailed complaint of serious misconduct against him.
- 88 We responded to Mr Ramulifho's reply under cover of a letter dated 23 June 2020, which was sent on 13 July 2020. A copy is attached as **annexure NG5**. Confirmatory affidavits by me and by Mr Joseph were attached to that response.
- 89 On 5 August 2020, we received a letter from the LPC, confirming that the case was referred to an investigating committee ("**the committee**"). A copy of the letter is attached as **annexure NG6**.
- 90 On 13 October 2020, Mr Louw informed me that he received a letter from the LPC, communicating its decision to dismiss the complaint. A copy of the letter is attached as **annexure NG7**. The LPC's decision was as follows:

"We confirm that this complaint was considered by an Investigating Committee of the Legal Practice Council on 13 October 2020.

We confirm further that that the Committee upon consideration of the documentary evidence, recommended that the conduct in question does not warrant misconduct proceedings against the attorney and consequently that the complaint should be DISMISSED in terms of Rule 40.5.2 of the Legal Practice Council Rules, on the grounds that:

Rule 40.5.2.1. The respondent is not guilty of misconduct;

Rule 40.5.2.2. Has given a reasonable explanation to the allegations made against him/her;

Rule 40.5.2.4. There is no reasonable prospect of success in preferring a charge of misconduct against the Legal Practitioner.

We thus confirm that we regard the matter finalized and proceed to close our file.”

The attempted internal appeal

91 Mr Joseph, Mr Louw and I were dissatisfied with this decision. In accordance with section 41 of the LPA, on 9 November 2020 we lodged an appeal to the LPC’s appeal tribunal. A copy of the notice of appeal is attached as **annexure NG8**. We sought to appeal against –

91.1 the manner in which the investigating committee conducted the investigation into the complaint; and

91.2 the decision of the investigating committee in the complaint.

92 The grounds of appeal appear from the notice of appeal, and I do not repeat them here.

93 The LPC responded on 13 November 2020, in a letter dated 11 November 2020. A copy of the letter is attached as **annexure NG9**. In that letter, the LPC advised that an internal appeal against the finding of the investigating committee is not possible, as the appeal tribunal has not yet been established. The LPC advised that we should proceed with appeal or review processes in the High Court, should we wish to do so.

94 The LPC attached the reasons for the investigating committee's recommendations to its 11 November letter, noting its view that the appeal would be incomplete without those reasons. A copy of the reasons is attached as **annexure NG10**. It appears from the reasons that the investigating committee comprised a single member, a Mr Y Mayet. It is not clear from the document whether or not Mr Mayet is an attorney, as required by rule 38.4.

95 The reasons the investigating committee gives for dismissing the complaint are, in summary, as follows:

95.1 The committee acknowledges that the allegations made in the complaint would, if true, indicate professional misconduct on the part of Mr Ramulifho "*if it was committed in [his] capacity as a legal practitioner.*" (para 9.3)

95.2 However, the committee takes the view that the evidence presented in support of the complaint was insufficient. Either the allegations must be tested by "*an authority other than the LPC*", or "*reasonable and credible verification*" must be presented in support of them. Only then can the LPC investigate the possible misconduct (para 9.6). The committee takes the view that the allegations are based on hearsay, which it cannot rely on (para 9.4).

95.3 Regarding the complaint relating to the Tshikalange Affidavit:

95.3.1 The committee questioned what proof there was that Mr Ramulifho confirmed the correctness of falsehoods in that affidavit knowing them to be false. (para 15.3.1)

95.3.2 The committee rejected the concerns regarding Ms Tshikalange's signature on the basis that the complainants do not have the expertise necessary to make allegations about a signature being suspect. (para 15.3.2.1)

95.3.3 Regarding Ms Tshikalange's own denial that she signed the affidavit, supported by her lawyer, the committee notes that the allegations "*may very well be true*" but are hearsay, and cannot be relied on. (para 15.3.3)

95.3.4 The committee took the view that the allegations need to be tested by an authority other than the LPC "*to have any value*" for purposes of determining whether or not there is misconduct on the part of Mr Ramulifho. (para 15.3.4)

95.4 Regarding the complaints in relation to the proofs of payment and the FNB bank statement:

95.4.1 The committee decided that the question whether or not the amounts paid to Ocean Basket were repaid is "*a matter of fact which must be conclusively determined by an authority other than the LPC as it relates to private conduct.*" Only once a finding has

been made supporting the allegations can the LPC investigate possible misconduct. (paras 17.2 and 18)

95.5 Regarding the complaint relating to the Naude affidavit:

95.5.1 The committee noted that the allegations are “*particularly serious*”; however, decided that they are hearsay and cannot be relied on. (para 19.2)

95.6 The committee did not deem it necessary to deal with Ramulifho’s reply to the complaint in any detail because of what it termed the “*serious flaws*” in the complaint. (para 21)

95.7 The committee reasoned that the onus is on the complainant to tender evidence “*sufficient to persuade [the committee] that a subsequent tribunal might or could reasonably find for the complainant*”. It referred to *De Klerk v Absa Bank* 2003 (4) SA 315 as authority for this proposition. (para 22)

95.8 The committee concluded as follows:

“In accordance with the provisions of Rule 40, I considered the Complaint, the Respondent’s answer thereto and further documents submitted and am of the opinion that the Complaint be dismissed on the grounds that the conduct in question does not necessarily warrant misconduct proceedings on the following grounds:-

23.1 *that the Respondent is not guilty of misconduct;*

23.2 *that the Respondent has given a reasonable explanation for his conduct;*

23.3 *that there is no reasonable prospect of success in preferring a charge of misconduct against the Respondent.”*

96 I am advised and submit that the committee’s decision to dismiss the complaint, as set out above, is unlawful on a number of grounds.

97 These grounds include the following:

97.1 The committee failed to comply with section 37(3) of the LPA.

97.2 The process followed was irrational.

97.3 The decision is substantively irrational and unreasonable.

97.4 The decision is based on material error of law.

97.5 The committee failed to consider relevant factors.

98 The decision to dismiss the complaint is therefore subject to be reviewed and set aside, either in terms of the relevant provisions of PAJA, or in terms of the principle of legality.

99 I submit that the applicants have exhausted the internal remedies available to us, by filing a notice of appeal with the LPC. As the LPC has informed us that an internal appeal is not possible, and advised that we proceed in the High Court, I submit that the requirement to exhaust internal remedies was met, as of 13 November 2020.

100 I deal with each ground of review in turn below.

GROUNDINGS OF REVIEW

Failure to comply with section 37(3)(b) of the LPA

Failure to investigate

101 As I have explained earlier in this affidavit, the investigating committee may only dismiss a complaint if the prerequisites in section 37(3) are met. One of these requirements is that the investigating committee can only make its determination “*after investigating a complaint*”.

102 “*Investigate*” is not defined in the LPA. The ordinary meaning of the word entails, at the very least, making inquiries to discover and examine the facts of an allegation so as to establish the truth.

103 The LPC performs an important role in society. It regulates the conduct of legal practitioners, in the public interest. When it conducts investigations, it does so in fulfilment of its statutory duty to protect and promote the public interest – so as to ensure that the public is protected from unscrupulous practitioners.

104 It follows that, where a complaint is made about a legal practitioner, the LPC is obliged to undertake a proper investigation, to ensure that, where a legal practitioner has a case to answer, the proper disciplinary process is followed. Only then can the public have confidence in the process.

105 A proper investigation requires that the LPC's investigating committee be proactive. It cannot just sit back and wait for conclusive proof to be presented to it. It must actively make inquiries with a view to discovering the truth. It is an investigative committee – not a supine adjudicator.

106 The investigating committee must conduct its investigation with an open and enquiring mind – one that is open to all possibilities and reflects upon whether the truth has been told. It must ask questions and seek out information.

107 As I have explained earlier in this affidavit, the investigating committee has substantial investigative powers to assist it in performing this role. The investigating committee is obliged to use these powers, to ensure that the complaint is properly and effectively addressed. Its investigation should be conducted as comprehensively as possible, in order to inspire public confidence in the process.

108 The investigating committee failed to investigate the complaint.

108.1 The committee fundamentally misconceived its role. Its approach was to consider the documents before it, and apply a strict evidentiary standard to those documents. Because certain allegations were considered hearsay, the committee dismissed them out of hand. It also considered certain factual issues as falling outside of its remit entirely, such that the LPC could only investigate those issues if a prior decision on the facts had been taken by a different authority – presumably a court.

- 108.2 This is plainly not the committee's role. Its role is to investigate – to be proactive, and to use its investigative powers to discover the facts. It is not to sit passively and consider the documents before it, on the same strict rules of evidence that a court would apply.
- 108.3 The committee had extensive investigative powers open to it, which it did not exercise.
- 108.4 For instance, to the extent that it was not comfortable relying on statements made in the complaint as to what Ms Tshikalange had said to Mr Joseph, or what her lawyer, or Mr Naude had said to Mr Louw, the committee ought to have contacted those persons, and conducted its own enquiries. It would have been within the committee's powers to do so. In terms of rule 40.2.1, the committee may "*take any steps which are not prohibited by law to gather information with regard to the complaint or allegation*" (rule 40.2.1). A simple phone call to any of these three persons could have assisted the committee in determining whether there was any merit in the allegations, such that it should investigate further.
- 108.5 The committee was also empowered, in terms of rule 40.2.2, to request the complainants to provide further particulars on any aspect of the complaint. If, for instance, the committee required contact details for Ms Tshikalange, her lawyer, or Mr Naude, they could have requested these. Alternatively, they could have requested that confirmatory affidavits be provided (though I submit that it was for the committee to obtain this corroborating evidence, not the complainants).

108.6 If the committee was not sure whether Ms Tshikalange's signature had been forged, it could have approached an expert itself to obtain further information on this – or requested the complainants to do so. If it wanted to check the information provided concerning the discrepancies in the bank statements, it could have made inquiries with the relevant banks.

108.7 It did not do so. Nor did it use its power to request Mr Ramulifho to appear before it; nor its power to request books, documents and articles.

109 In short, the committee used none of its investigative powers whatsoever. It took on the role of a passive adjudicator (applying strict rules of evidence), rather than an investigative body, charged with making inquiries in an effort to discover the facts. What the committee did in this case cannot properly be described as an "*investigation*" at all – still less one undertaken by a body charged with protecting the public interest against possible misconduct by unscrupulous practitioners.

110 Therefore, I submit that the decision to dismiss the complaint was unlawful in that:

110.1 The committee failed to comply with a mandatory and material procedure or condition prescribed by section 37(3)(b) of the LPA. The decision is accordingly reviewable in terms of sections 6(2)(b) of PAJA or the principle of legality.

110.2 The committee's decision contravenes section 37(7)(b) of the LPA, and is accordingly reviewable in terms of section 6(2)(f) of PAJA or the principle of legality.

Whether the committee was "satisfied"

111 In addition to the obligation to investigate, section 37(3) provides that, before an investigating committee can dismiss a complaint, it must be satisfied that the complaint "*should be dismissed on the grounds that the conduct in question does not necessarily warrant misconduct proceedings, as set out in the code of conduct.*"

112 I submit that this prerequisite for a dismissal decision was not met.

113 In its reasons document, the committee says that it is "*of the opinion*" that the complaint should be dismissed because it does not necessarily warrant misconduct proceedings (para 23).

114 However, I am advised that it is not enough for the committee to say that it subjectively held the opinion that the matter does not warrant misconduct proceedings. The test is objective. The question is whether the opinion the committee formed was founded on reasonable grounds. Only then is the requirement that the committee be "*satisfied*" that the complaint should be dismissed, met.

115 I submit that the committee did not have reasonable grounds to sustain its opinion that misconduct proceedings were not warranted. It had before it

evidence of misconduct, and had various avenues of investigation open to it. It elected to dismiss that evidence out of hand, without any further investigation. It cannot, in the circumstances, have had reasonable grounds to pronounce itself satisfied that misconduct proceedings were not warranted.

116 Therefore, I submit that the decision to dismiss the complaint was unlawful in that:

116.1 The committee failed to comply with a mandatory and material procedure or condition prescribed by section 37(3)(b) of the LPA. The decision is accordingly reviewable in terms of sections 6(2)(b) of PAJA or the principle of legality.

116.2 The committee's decision contravenes section 37(7)(b) of the LPA, and is accordingly reviewable in terms of section 6(2)(f) of PAJA or the principle of legality.

The process followed

117 I submit that the failure to investigate renders the committee's decision procedurally irrational and unfair.

118 I am advised that the process by which a decision is made must be rational. This means that the process chosen must be rationally related to the achievement of the objectives of that process.

119 The decision to dismiss the complaint could only have been rational if it was preceded by a proper investigation, followed an assessment of relevant evidence, collected during the investigation. As the committee did not investigate the complaint properly (or indeed at all), it followed an irrational procedure. It is not possible for the committee to have arrived at a rational decision to dismiss the complaint without it having investigated the complaint and conducted a proper assessment of the relevant evidence relating to the complaint.

120 The committee's decision is therefore unlawful on this basis alone, and stands to be set aside.

121 The impugned decision was also procedurally unfair, within the meaning of section 3 of PAJA. The complainants were entitled to have the decision taken in accordance with the process set out in section 37(3) of PAJA. The committee, by failing to conduct an investigation, failed to follow that prescribed process, rendering the decision procedurally unfair.

122 Therefore, I submit that the decision to dismiss the complaint was unlawful in that:

122.1 The decision was taken in a procedurally unfair manner. It is accordingly reviewable under section 6(2)(c) of PAJA or the principle of legality.

122.2 The decision was not rationally connected to the purpose for which it was taken; the purpose of the empowering provision; the information before the committee and the reasons given for it. It is accordingly reviewable

under sections 6(2)(f)(ii)(aa), 6(2)(f)(ii)(bb), 6(2)(f)(ii)(cc) and 6(2)(f)(ii)(dd) of PAJA or the principle of legality.

122.3 The decision was arbitrary, and is therefore reviewable under section 6(2)(e)(vi) of PAJA or the principle of legality.

The basis for the committee's conclusions

123 The committee concluded that the complaint should be dismissed because it does not necessarily warrant misconduct proceedings on the following grounds:

123.1 that Mr Ramulifho is not guilty of misconduct;

123.2 that Mr Ramulifho has given a reasonable explanation for his conduct;

123.3 that there is no reasonable prospect of success in preferring a charge of misconduct against Mr Ramulifho.

124 None of the three grounds on which the committee purportedly based its decision bears scrutiny.

125 First, regarding the decision that Mr Ramulifho “*is not guilty of misconduct*”:

125.1 This conclusion has no basis in the information that was before the committee, or, indeed, its own reasoning.

125.2 The tenor of the committee's reasons is that the allegations against Mr Ramulifho may be true, but better evidence is needed to sustain misconduct proceedings. On more than one occasion, the committee says that the proper approach would be first to approach a different authority, and then to bring the complaint to the LPC.

125.3 Therefore, the committee's overall sense, as evidenced by the reasons, is one of uncertainty: the reasons at most support a conclusion that the committee cannot be sure one way or another – certainly not a categorical conclusion, as expressed at the end, that Mr Ramulifho is not guilty of misconduct.

126 Second, regarding the decision that Mr Ramulifho "*has given a reasonable explanation for his conduct*":

126.1 The committee's reasons provide no basis for this conclusion. The committee did not engage with Mr Ramulifho's reply to the complaint at all. It took the view that the complaint itself was so defective as to essentially make a reply unnecessary. A single line's reference to the reply is far from sufficient to found a conclusion that Mr Ramulifho has given a reasonable explanation for his conduct.

126.2 In any event, there is no reasonable basis on which one might conclude that Mr Ramulifho has given a "*reasonable explanation*" for his conduct. Nothing in his reply to the complaint can be construed as an "*explanation*" at all – let alone a "*reasonable*" one.

127 Third, regarding the decision that there is no reasonable prospect of success in preferring a charge of misconduct against Mr Ramulifho:

127.1 The committee reached this conclusion without performing a proper investigation. It cannot, in the circumstances, claim to know whether or not there is a reasonable prospect that Mr Ramulifho would be found guilty of misconduct. It failed to perform the investigation necessary to arrive at a reasoned conclusion in this regard.

127.2 In any event, this decision is not justifiable based on the information before the committee. On the evidence the complainants provided, I submit that there is a *prima facie* case for Mr Ramulifho to answer, and a reasonable prospect that he would be found guilty of misconduct.

128 This decision is therefore not justifiable on the basis of the information available to the committee, or the reasons it gave.

129 The purpose of the committee's powers under section 37(3) of the LPA is to ensure that, where a legal practitioner may, on the basis of the *prima facie* evidence, be guilty of misconduct, that the complaint proceeds to adjudication by a disciplinary committee. On the other hand, if the *prima facie* evidence does not support this conclusion, section 37(3) provides for the complaint to be dismissed at that stage. The purpose of these provisions is to ensure that potentially meritorious complaints proceed to a proper disciplinary hearing, but that the LPC's disciplinary resources are not spent on complaints that do not have prospects of success.

130 On the evidence the complainants provided, I submit that there is a *prima facie* basis on which to conclude that Mr Ramulifho may be guilty of misconduct. That is not a high standard: all that is required for referral to a disciplinary committee is evidence that shows, *prima facie*, that he may be guilty (not “is guilty”) of misconduct. To dismiss the complaint in circumstances in which the *prima facie* evidence indicates that Mr Ramulifho may be guilty of misconduct, undermines the purposes of the LPA, and is accordingly irrational.

131 Therefore, I submit that the decision to dismiss the complaint was unlawful in that:

131.1 The decision was not rationally connected to the purpose for which it was taken; the purpose of the empowering provision; the information before the committee and the reasons given for it. It is accordingly reviewable under sections 6(2)(f)(ii)(aa), 6(2)(f)(ii)(bb), 6(2)(f)(ii)(cc) and 6(2)(f)(ii)(dd) of PAJA or the principle of legality.

131.2 The decision was arbitrary, and is therefore reviewable under section 6(2)(e)(vi) of PAJA or the principle of legality.

131.3 The decision was unreasonable and is accordingly reviewable under section 6(2)(h) of PAJA or the principle of legality.

Error of law

132 The committee’s decision to dismiss the complaint was based on a fundamental misunderstanding of its powers and obligations.

133 The committee dismissed the complaint primarily on two bases: first, because it considered there to be insufficient “*credible and verifiable evidence*” to support it; and second, because it took the view that certain questions of fact were beyond its remit, and first had to be determined by a different authority before the LPC could consider them.

134 That reasoning belies a misunderstanding of the investigating committee’s role and the applicable law.

134.1 The committee’s starting point was that the onus is on the complainant to tender evidence “*sufficient to persuade [the committee] that a subsequent tribunal might or could reasonably find for the complainant*”. It referred to *De Klerk v Absa Bank* 2003 (4) SA 315 as authority for this proposition. But I am advised that that case is not authority for that proposition. Though it is correct that in ordinary civil proceedings before a court, the onus is on the applicant to prove its case, there is no basis for the committee’s conclusion that a similar onus applies to a complainant in a complaint to the LPC. The committee’s role is to investigate a complaint to see if there is merit to it, not to adjudicate the complaint based on the papers, in a manner akin to a court in motion proceedings. The obligation rests on the committee to investigate and reach a decision, not on the complainant to prove a case.

134.2 The committee also misconstrued its role in relation to its approach to the evidence. It applied a strict evidentiary standard to the documents before it. Because it considered certain allegations of the allegations to be based

on hearsay, the committee dismissed them out of hand. But there is no reason for the committee to consider itself bound by the rules of evidence that would apply in a court setting. In fact, one of the cases to which the committee itself refers (*Incorporated Law Society, Transvaal v Meyer and Another* 1981 (3) SA 962 (T)) specifically holds that disciplinary proceedings against attorneys are not “*civil proceedings*”; and that evidence which would have been inadmissible in civil proceedings can be considered in disciplinary proceedings against an attorney.

134.3 Finally, the committee took the view that certain factual issues fell outside of its remit entirely, such that the LPC could only investigate those issues if a prior decision on the facts had been taken by a different authority – presumably a court. I submit that that is not the correct position in law. If the LPC were not empowered to take decisions on factual issues, its disciplinary function would be all but meaningless. Disciplinary proceedings would always have to be preceded by a court hearing to determine the facts. That would render the disciplinary role of the LPC nugatory.

134.4 I submit that, in this respect too, the committee erred on the law. It also abdicated its obligation to investigate and determine whether the complaint, on the prima facie evidence, had merit, to an unspecified “*authority other than the LPC*”, in circumstances in which this duty plainly rests on the LPC itself.

135 These errors of law meant that the committee fundamentally misconceived its role, and ultimately resulted in the committee dismissing the complaint. The committee's decision is accordingly reviewable in terms section 6(2)(d) of PAJA, or the principle of legality.

Failure to consider relevant factors

136 The committee's erroneous approach to the investigation and the evidence meant that it failed to take relevant considerations into account. For instance:

136.1 The committee did not consider whether there was *prima facie* evidence that the proofs of payment or FNB statement had been forged, because it considered this to be a "*question of fact*" that had to be determined by an authority "*other than the LPC.*"

136.2 The committee did not give any consideration to whether the Naude affidavit had been forged, because it decided that the only evidence in this regard was hearsay – without making any attempt to contact Mr Naude or perform any investigation whatsoever.

136.3 The committee did not give any consideration to whether the Tshikalange Affidavit had been forged, because it decided that a different authority first had to decide this question before the LPC could consider it.

136.4 The committee did not engage with Mr Ramulifho's reply to the complaint at all. It did not consider whether that cursory reply was adequate to rebut the serious allegations made against him, because it took the view that

the complaint itself was so defective as to essentially make a reply unnecessary.

137 There were all considerations of utmost relevance, which the committee ignored entirely.

138 Therefore, I submit that the decision to dismiss the complaint was unlawful in that the committee failed to take account of relevant considerations in making its decision. The decision is therefore reviewable under section 6(2)(e)(iii) of PAJA or the principle of legality.

REMEDY

139 For the reasons set out above, I submit that the committee's decision to dismiss the complaint was unlawful, and should be reviewed and set aside.

140 I submit that it would be just and equitable for the court to remit the matter for the LPC, for a new investigating committee to investigate the complaint afresh and take a decision on the complaint in terms of section 37(3). I submit that a new investigating committee should be formed, and that Mr Mayet, as the erstwhile investigating committee, should not serve on the new committee.

141 I am advised that I will be entitled to supplement these grounds of review once I receive the record in terms of Rule 53(4). Pending such supplementation, I pray for an order in terms of the notice of motion.

NATHAN GEFFEN

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and affirmed to before me at _____ on this the ____ day of _____ 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS

Full names:

Address:

Capacity: